Interstate Security Services, Inc. *and* Mary E. McDonald *and* Raymond A. Way. Cases 39-CA-96 and 39-CA-206

July 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 26, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent and counsel for the General Counsel filed exceptions and supporting briefs, and Respondent filed a brief in reply to the General Counsel's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

The Administrative Law Judge found, *inter alia*, that Respondent's discharge of Raymond A. Way violated Section 8(a)(1) of the Act. In so finding, he first determined that the November 6, 1979, meeting which Way was directed to attend was a meeting which Way reasonably believed might result in his discipline and that *Weingarten* protections[4] apply at a nonunion facility. He further found that Respondent denied Way's request that he be accompanied by a representative at the meeting and, as a result of Respondent's refusal, Way declined to participate in the interview. The Administrative Law Judge then found that Respondent, following Way's refusal to attend the meeting, decided to terminate Way and stated as one of its reasons for so doing Way's refusal to attend the November 6, 1979, meeting. The Administrative Law Judge then decided that Way's refusal to attend the meeting constituted protected concerted activity and that the termination violated Section 8(a)(1) of the Act. *International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO* v. *Quality Manufacturing Co., et al.*, 420 U.S. 276 (1975).

The Administrative Law Judge also found that Way was engaged in protected concerted activity when he and several fellow employees generated a newspaper story protesting disciplinary action taken against Way, even though the story contained certain information about Respondent's security measures. Here again, part of the stated grounds for Way's discharge involved his protected concerted activity in generating the newspaper article and, consequently, the Administrative Law Judge found the discharge violative of Section 8(a)(1).

In its exceptions, Respondent initially challenges the Administrative Law Judge's findings regarding the November 6 interview. It argues that *Weingarten* rights do not apply at a nonunion facility and that Way had no right to representation because the interview was for the purpose of imposing discipline. Next, Respondent argues that it had the right to discharge Way without an interview, and that, in any event, Way failed to invoke his *Weingarten* rights properly. Finally, Respondent asserts that Way's actions in generating the newspaper story were not protected by the Act because his actions constituted disloyalty and a breach of confidentiality. We find no merit in Respondent's exceptions.

With respect to the November 6 interview, we have recently held that *Weingarten* rights do apply at a nonunion facility.[5] Also, for the reasons stated by the Administrative Law Judge, we agree that the interview was an investigatory interview within the meaning of *Weingarten*[6] and that Way properly invoked his right to representation.

As for Respondent's assertion that it could lawfully terminate Way without conducting the scheduled November 6 interview, we note that, in and of itself, this is a proper statement of the law. At the time Way declined to attend the interview without a representative Respondent was privileged to continue its investigation and render appropriate discipline. The simple fact is, however, that Respondent did more than what it was lawfully entitled to do; namely, in imposing discipline, Respondent relied

[1] We hereby grant counsel for the General Counsel's "Motion To Correct Order" and shall modify the Administrative Law Judge's recommended Order and notice by substituting "Officer-in-Charge for Subregion 39" for "Regional Director for Region 1" and by providing the proper address for the Subregional Office on the notice.

[2] Respondent and counsel for the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[4] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[5] *Materials Research Corporation*, 262 NLRB 1010 (1982).

[6] See *Baton Rouge Water Works Company*, 246 NLRB 995 (1979). Member Fanning, who dissented in *Baton Rouge*, would find that the November 6 interview was one to which *Weingarten* protections attached for the reasons stated in his dissent in *Baton Rouge*.

on Way's refusal to attend the interview as a basis for his termination. Thus, while Respondent was legally entitled to forgo the interview if Way insisted on representation, Way was equally protected under the Act in refusing to attend the interview. *Weingarten*, 420 U.S. at 258–259. And, as the Supreme Court held in *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276, a companion case to *Weingarten*, an employer violates Section 8(a)(1) when it discharges, or otherwise disciplines, an employee for insisting upon his or her *Weingarten* rights.

With respect to the newspaper article, Respondent's assertion that Way was not protected when he and several fellow employees generated the story is also without merit. We have held in several cases that employees are protected in expressing their views on pending labor disputes to the public so long as such expressions do not constitute disloyalty or disparagement of Respondent's product or reputation.[7] In addition, "absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum." Thus, even where employees, in expressing their position on a labor dispute, coincidently reveal information that the respondent "would understandably prefer to keep out of the public eye,"[8] the employees are protected by the Act.

In the instant case, the newspaper article plainly constituted an expression of the employees' views, and Way's in particular, concerning a labor dispute with Respondent. As found by the Administrative Law Judge, the employees violated no reasonable existing rule in prompting the story and made no false statements except for the surmise that Way was being "picked on" because of union activities. Also, our reading of the record reveals nothing in the article which can reasonably be termed malicious, disloyal, or a disparagement of Respondent.[9] Thus, to the extent Respondent relied upon the newspaper article incident as a basis for Way's discharge,[10] it violated Section 8(a(1).

Having found that Respondent relied upon two incidents of protected concerted activity as bases for Way's discharge, the only remaining issue is whether Respondent demonstrated that it would have discharged Way in the absence of his protected conduct. The Administrative Law Judge found that no such showing was made. We agree.

As noted above, Respondent presented six reasons for the termination of Way. Three of the six involved the activities discussed above which we have found to be protected by the Act. The three other reasons cited were frequent absenteeism when scheduled to work weekends, refusing instructions to get a haircut, and "overall, a poor attitude." In its exceptions, Respondent does not argue specifically that the latter three reasons established a sufficient basis for discharge but instead seems to assert that the newspaper article incident served as the reason for Way's termination.[11] In any event, we find that Way would not have been terminated absent his protected activity.

In support of our conclusion we note that well prior to his discharge Way had received warnings regarding the length of his hair and the frequency of his weekend absences. At no point was there any indication whatsoever that any of these actions would lead to termination. As for Way's attitude, a vague catchall concept, there is no record of any action being taken against Way on such grounds.

In contrast, the publication of the newspaper article prompted Respondent to immediately suspend Way. This incident also precipitated the November 6 meeting. Thus, prior to the newspaper article, no termination-related actions were taken by Respondent and it was only after the article appeared and after Way refused to attend the meeting that Respondent decided to terminate Way. Accordingly, we conclude that Respondent would not have terminated Way in the absence of his engaging in protected concerted activity and, therefore, that Way's discharge violated Section 8(a)(1).[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Interstate Security Services, Inc., Haddam, Connecticut, its officers, agents, successors, and assigns,

[7] *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980) (letters to customers of the respondent alleging the respondent's operations to be unsafe found protected); *Richboro Community Mental Health Council, Inc.*, 242 NLRB 1267 (1979); *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976).

[8] *Allied Aviation, supra* at 231.

[9] Compare *American Arbitration Association, Inc.*, 233 NLRB 71 (1977).

[10] In the termination letter provided Way, two of the six reasons stated for termination involved the newspaper article incident.

[11] Of course, if that incident was the sole reason for Way's discharge, Respondent clearly violated Sec. 8(a)(1) inasmuch as we have found Way's actions in that regard to be protected under the Act.

[12] Respondent challenges the Administrative Law Judge's finding that it did not decide to terminate Way until after the November 6 meeting. For the reasons fully set forth by the Administrative Law Judge, we agree with his finding. Assuming *arguendo*, however, that the decision was made prior to the abortive November 6 interview, it is clear on the record that the earliest possible time the decision could have been made was following publication of the newspaper article. If that were the case, which we find it is not, Way's discharge would still be unlawful inasmuch as it would still have been prompted by a protected concerted action by Way.

shall take the action set forth in the said recommended Order, as so modified:

1. In paragraph 2(d) substitute "by the Officer-in-Charge for Subregion 39" for "by the Regional Director for Region 1."

2. In paragraph 2(e) substitute "Notify the Officer-in-Charge for Subregion 39" for "Notify the Regional Director for Region 1."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discipline you for requesting to be represented by a fellow employee at any interview or meeting held with you where you have reasonable grounds to believe that the matters to be discussed may result in your being the subject of disciplinary action.

WE WILL NOT require you to take part in an interview or meeting where you have reasonable grounds to believe that the matters to be discussed may result in your being the subject of disciplinary action and where we have refused your request to be represented at such meeting by a fellow employee.

WE WILL NOT interfere with, restrain, or coerce you by suspending or discharging you for engaging in protected concerted activities.

WE WILL NOT promulgate any rule prohibiting you from engaging in any union activities during working hours, so long as your activities do not interfere with your work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in self-organization, to join or assist The Federation of Special Police and Law Enforcement Officers, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent permitted by Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL offer Raymond A. Way immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of our discharge of him, with interest.

WE WILL revoke our rule, promulgated on March 3, 1980, prohibiting you from engaging in union activities during working hours.

INTERSTATE SECURITY SERVICES, INC.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard before me in Hartford, Connecticut, on August 27 and 28, 1980. It involves two discharges and one rule barring certain union activities, all alleged to be in violation of Section 8(a)(3) and (1) of the Act.[1] Respondent denied that it violated the Act in any way.

Upon consideration of the entire record in this proceeding, including the demeanor of the witnesses, and upon review of the briefs and supplemental briefs submitted by both the General Counsel and Respondent, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Interstate Security Services, Inc., a Connecticut corporation with an office and place of business in East Lyme, Connecticut, has been engaged in the operation of a security guard business providing security guard services, *inter alia*, for Northeast Utilities Services Company (Northeast) at the Connecticut Yankee Nuclear Power Plant (Power Plant) in Haddam, Connecticut. During the calendar year ending December 31, 1979, Respondent, in the course and conduct of those operations, provided services valued in excess of $50,000 for other enterprises within the State of Connecticut, including Northeast, which are directly engaged in interstate commerce.

Further, Northeast has maintained an office and place of business at Power Plant in Haddam, Connecticut, where it has been engaged as a public utility in the generation, transmission, distribution, and sale of electricity and related products. During the calendar year ending December 31, 1979, Northeast provided electricity valued in excess of $50,000 from its Power Plant directly to points located outside the State of Connecticut. As a consequence, I find and conclude, as Respondent admits, that it is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find and conclude that Local Union No. 611, Laborers International Union of North America, AFL-CIO (Laborers Union) and The Federation of Special Police and Law Enforcement Officers (Federation) are now and have been at all times material herein labor or-

[1] The relevant docket entries are as follows: The charge in Case 39-CA-96 was filed by Mary E. McDonald on January 21, 1980, and a complaint issued thereon on March 31, 1980. The charge in Case 39-CA-106 was filed by Raymond A. Way on April 14, 1980, and an order consolidating cases and a consolidated complaint issued on August 6, 1980.

ganizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Discharge of Raymond A. Way*

1. The facts

On October 16, 1979, Way, a guard at the front entrance to the Power Plant, failed to detect a weapon being carried by another security officer passing through a metal detection device. Respondent's witnesses said that a light went on and that Way was negligent in his duties. Way, on the other hand, said that his equipment was defective.

Because of the incident, Way and two other guards were required to go through retraining on the metal detector. Way became incensed at the suggestion and refused to attend his retraining session scheduled for October 22, 1979, as a result of which he was suspended. Finally, on October 29, he agreed to be retrained and went to a session on October 31, after which he was reinstated to employment. However, feeling that he was being harassed, Way, accompanied by some other employees, decided to take his case to a newspaper. An article was published on or about November 1, revealing information which Respondent contends it did not desire to have published, and containing Way's complaint that he was being picked on because of his union activities. Way was again suspended, this time for giving out false information and privileged security information, pending a meeting with management, scheduled for November 6, 1979. Upon Way's request to bring a "witness," he was told by Ronald Guerette, Respondent's security supervisor, that he did not know, but saw no reason why he could not.

Way arrived with six persons (including other guards employed by Respondent). However, he was told by John Devine, Respondent's assistant to the regional manager, that Respondent would see each person, one at a time, starting with Way. Way refused to meet with management alone, stating that he would not be interviewed alone because he was worried that something might happen to him. Way was then told that he remained under suspension. Shortly thereafter, Respondent prepared a letter of discharge, dated November 6, 1979, which read, in part, as follows:

> As a result of your refusal to meet with ISS Regional Management this morning, you have made it necessary for us to terminate you in writing rather than in person. You were instructed to come to the Flanders office for a meeting at 9:00 a.m. You arrived with a number of friends and refused to meet with us without these friends present. We felt that the matter under discussion did not merit group attendance and as indicated to you by John Devine, it was our intention to meet with you and then each of your friends individually. You refused.
>
> As a result of previous actions, listed below, your employment is severed. An unemployment notice is attached, indicating you were discharged for willful misconduct. The actions are as follows:
>
> 1. Making false statements.
>
> 2. Divulging privileged Site Security related information.
>
> 3. Frequent absenteeism when scheduled to work weekends.
>
> 4. Refusing legitimate instructions from a supervisor to get a haircut.
>
> 5. Refusal to meet with ISS Regional Management as directed.
>
> 6. Overall, a poor attitude.

2. Discussion

The above letter makes it clear that at least one reason for Way's discharge was his refusal to meet alone with Respondent's management and his insistence upon a "witness" being present. The Supreme Court has held that an employee has a right to the presence of his collective-bargaining representative at an employer-conducted investigatory interview where the employee has a reasonable fear that he will be disciplined. *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). Respondent does not question, and I conclude, that Way had a reasonable belief that the interview might result in discipline being meted out against him. Respondent claims, however, that *Weingarten* rights do not apply to an unorganized facility. The Board has not yet directly answered this question, but as I pointed out in *E. I. Dupont de Nemours*, JD-503-80 (1980), there is sufficiently strong *dicta* in decisions by the Board and by one United States Court of Appeals to sustain the principle that *Weingarten* applies, whether an employer is organized or not.

In *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978), enfd. in relevant part 592 F.2d 94 (2d Cir. 1979), the Board stated:

> We conclude that Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.

Further, the Board's own reading of *Weingarten* and *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276 (1975), persuaded it:

> that the Court's primary concern was with the right of employees to have some measure of protection against unjust employer practices, particularly those that threaten job security. These employee concerns obtain whether or not the employees are represented by a union. *Ibid.*

In *Anchortank, Inc.*, 239 NLRB 430 (1978), employees asked for union representation after the union had been elected but before it had been certified. The Board, finding that the employer unlawfully denied the employees' request, stated that the emphasis of *Weingarten* was the "employee's right to act concertedly for protection in the face of a threat to job security, and not upon the right to be represented by a duly designated collective-bargaining representative," and that the employee's concern for protection "remains whether or not the employ-

ees are represented by a union." Thus, because the request was an exercise of Section 7 rights, it mattered not whether it was a request for an uncertified union representative or a fellow employee.

The Fifth Circuit Court of Appeals partially enforced the *Anchortank* decision at 618 F.2d 1153 (1980). Although the court had many problems, referring, at 1155, to the case as a whole as "an issue of subtle complexity [which] apparent simplicity quickly disintegrates to reveal an amalgam composed of a considerable number of sub-issues," it had little difficulty in concluding that there are *Weingarten* rights in a nonunion plant and that an employee engages in concerted activities when he requests the presence of a fellow employee at an investigatory interview, providing that the employee is in the same appropriate unit as the employee who is being investigated. (618 F.2d at 1157). The court specifically did not decide whether the right attaches to a request for an employee not within the unit. (*Id.* at 1158, fn. 5).

The weight of the foregoing authorities, albeit much *dicta*, is compelling. There are *Weingarten* rights in Respondent's nonunion facility; but that does not end the inquiry. Although Administrative Law Judge Winkler held to the same effect in *Tokheim Corporation*, JD-573-79,[2] he nonetheless dismissed the complaint because the employee asked not for a "representative" but for a "witness" to be present solely in an observational role. Noting that the difference may be "an overly nice exercise in semantics," he found that it was significant in light of *Weingarten's* emphasis on the "important function of a union representative at an 'investigatory interview.'"

However, as noted by the Board in *Anchortank*: "the union representative's role is limited to assisting the employee and possibly attempting to clarify the facts or suggest other employees who may have knowledge of them. Thus, the union representative is not permitted to use the powers conferred upon the union by its designation as collective-bargaining agent, and, in essence, may do no more during the course of the interview than could a fellow employee." 239 NLRB at 430-431. In *Mobil Oil Corporation*, 196 NLRB 1052 (1972), and *Quality Manufacturing Company*, 195 NLRB 197 (1972), the Board held that an employer has no duty to bargain with the union representative at an investigatory interview. But in *Southwestern Bell Telephone Company*, 251 NLRB 612, 613 (1980), the Board held that the Supreme Court in *Weingarten* "intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by a statutory representative who is present at such an interview" and that "an employer's right to regulate the role of the statutory representative at an investigatory interview is limited to a reasonable prevention of . . . a collective-bargaining or adversary confrontation with the statutory representative." There, the employer insisted that the union representative remain silent, thus stifling any participation by him in violation of the Act.

Even with the limitation of *Southwestern Bell*, it is obvious that the role of the representative is a passive one, rather than a full-blown advocate. The question which remains is whether, in the circumstances, Way's request was for this kind of representative, in light of Way's request to have not a "representative," but a "witness" present at his interview. Of course, that may depend on whether the "witness" Way desired was one who had seen the particular event for which Way thought he was going to be disciplined or whether Way desired someone to sit in on the interview and help him protect his rights. In the former instance, the Board has ruled that *Weingarten* does not "encompass any right an employee may have to produce witnesses on his or her behalf." *Coyne Cylinder Company*, 251 NLRB 1503, 1504, fn. 6 (1980).

Here, Way's request was twofold. He testified that he told Devine that "we wanted to have it straightened out now, that we thought that we could have a hearing and have it done with, because the people who were involved were there." But he also stated "that they had changed their stories before when I had meetings with them, and that's why I wanted a witness." Lee Smith, one of the six employees with Way and another guard who "was a witness to the incident" of October 16, 1979, testified only to Way's statement that "he was worried about something that might happen from [sic] him."

If, as the Board has held, the rationale of *Weingarten* is grounded on an employee's right to engage in concerted activities, then surely Way was seeking to take advantage of that right, if only for moral support to ensure that Respondent would not change its position about the contents of the interview. There is no assurance that the "witness," if privy to the events or even if familiar with Respondent's operation, would not have aided Way in stating his story. The "witness" in the sense used in *Coyne* may not have been a "representative" within the literal meaning of *Weingarten*; but in *Coyne*, the employer also refused to permit the employee to have his union representative at the interview, for which the Board found a violation. Thus, the employee in *Coyne* was afforded some measure of protection. Here, however, there is no union representative; and it ought not be held that the presentation of Way's case should not be aided by his fellow employee (even a witness), with the latter counseling Way in defense of charges which may result in disciplinary action.

Weingarten makes clear that there may be concerted activities "even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security." 420 U.S. at 260. The person giving aid or protection, to paraphrase and quote from *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503, 505-506 (2d Cir. 1942),[3] knows that by his action he assures himself, in case his turn ever comes, of the support of the one whom he is then helping; "and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." Further, the Court stated in *Weingarten* at 262:

[2] *Tokheim, Dupont,* and *Materials Research Corporation*, JD-(NY)-10-80, in which Administrative Law Judge Morton held that *Weingarten* rights do not apply to nonunion settings, and are all before the Board on exceptions.

[3] Cited with approval in *Houston Contractors Assn.* v. *N.L.R.B.*, 386 U.S. 664, 668-669 (1967); *Weingarten*, 420 U.S. at 261.

> . . . Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965).

The Act protects not only freedom of "self-organization" but also freedom of "association." "Association" may be between two employees as well as all employees, and "association" is protected in nonunion facilities as well as union facilities. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962); *N.L.R.B.* v. *Columbia University*, 541 F.2d 922, 931, fn. 5 (2d Cir. 1976). Respondent's discharge of Way denied him the right to freedom of association with his fellow employees. Way was willing to be interviewed if he had a "witness" present. Way's refusal to meet with management was one of the reasons for his discharge. Since Way's insistence on a witness was protected, his discharge violates the terms of Section 8(a)(1) of the Act. *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276 (1975).

However, Respondent claims that the foregoing reason was only one of many reasons for Way's discharge. In such a case, the Board's recent decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), is instructive. The General Counsel is required to show that the protected activity was a motivating factor in the discharge. This the General Counsel has clearly shown. At such point the burden shifts to Respondent to demonstrate that the same action, to wit, the discharge, would have taken place even in the absence of the protected conduct. Although Respondent's oral testimony was to the contrary, particularly the attempt of Walter Thoma, Respondent's assistant regional manager, to show that the decision to terminate Way had been made before the scheduled meeting of November 6, 1979, his testimony is contradicted by his own memo to Respondent's president, a memo which I credit in full, thus discrediting the remainder of his testimony. That memo of the scheduled meeting of November 6, 1979, reads, in part, as follows:

> R. Way arrived at Flanders with seven friends. Refused to meet with ISS Regional Management. ISS stated they would meet with each individually. This was not good enough. G. McDonald called D. Hicks to brief him on the situation and put together a termination notice. G. McDonald notified N. Tasker, T. Weekly and J. Mayoros on the situation and read the termination notice on R. Way.

This exact sequence of events was reiterated by Thoma as accurate. Indeed, when Way refused to meet, Devine told him that he was still under suspension. It is thus clear that the decision to terminate Way was made only after Way refused to meet with Respondent's management. Accordingly, there is no credible evidence to show that the same action would have taken place if Way had not refused to meet, as Thoma insisted. Way's discharge thus violated Section 8(a)(1) of the Act.

In addition, the General Counsel contends that Respondent's discharge of Way also violated Section 8(a)(3) of the Act. While concerted protected activities and union activities are by no means mutually exclusive theories for finding certain discharges to be in violation of the Act, the 8(a)(3) violation does not mesh with the facts of and leading up to the November 6 interview. I have found that Respondent did not make a decision to terminate Way until he refused to submit himself alone to what he perceived to be an investigatory interview.

Although it is clear that by time that Respondent knew of Way's union activities—because Way so admitted in the newspaper article—the record is barren of proof that it had any prior knowledge, despite the fact that I credit Way's assertions that he was instrumental in early organizing attempts for the Laborers Union, which finally failed because that union could not represent guards. Thus, the earlier discipline of him (including a warning for his long hair) cannot be attributed to illegal motivation. The incident involving a breach of the Power Plant's security could have prompted Respondent to discharge him immediately, if union animus was at the core of its thinking. Instead, Respondent required that Way be retrained, along with two other guards (one, a supporter of the Laborers Union; the other, not a supporter), a not unreasonable preventative measure in the circumstances; and even when Way balked at being retrained, Respondent gave him yet another opportunity to improve his security techniques.

The General Counsel contends that Respondent seized upon the newspaper article as a means of ridding itself of a union troublemaker, claiming that no rule published to employees had been violated and that the article was not false. The General Counsel understates the case. Although there was no specific rule at that time,[4] Respondent could well have been incensed that Way would reveal certain of its security techniques to the public and would jeopardize Respondent's contract with Northeast, upon which Respondent depended for its business. I do not find, therefore, that the article was a pretext to cover up Respondent's true motive of Way's union activities. The General Counsel suggests, however, and without explication, that Way's activities protesting Respondent's treatment of him could have been protected. Although this was not the theory of the complaint, the matter has been fully litigated and is ripe for disposition.[5] Here, Way and a number of fellow employees took Way's case to a newspaper. They violated no reasonable rule in doing so, and I find nothing false in the report, other than Way's surmise that he was being discriminated against because of his union activities.

[4] A rule was promulgated 4-1/2 months later. However, in one of Respondent's documents—it is unclear from the record whether it had been distributed to employees—there appears the following: "Never discuss your job with anyone while you are off duty." Although not at issue, this rule could easily violate the Act. *Texas Instruments Incorporated*, 236 NLRB 68, 72 (1978), enfd. in pertinent part 599 F.2d 1067 (1st Cir. 1979).

[5] *C & E Stores, Inc., C & E Supervalue Division*, 221 NLRB 1321, fn. 3 (1976).

Surely, if Way and the employees ceased work concertedly, that would be protected. And, if they distributed leaflets, that would be protected. I see no reason why wider distribution through a newspaper should have any less protection. Finally, although I have not found an 8(a)(3) violation herein, Way's publicity does not lose its protection merely because I have found him to be incorrect. If this were the law, every time employees strike in protest of alleged unfair labor practices, and so state, the employees would lose all protection under Section 7 if no violations were found. This is simply not the law. As a result, I find that Way's activity was protected and concerted; and I conclude that Respondent additionally violated Section 8(a)(1) of the Act by discharging him for engaging in that activity.

B. *The Discharge of Mary E. McDonald*

Mary E. McDonald was not exactly a model employee. Prior to the final events which resulted in her discharge, she was given a warning for leaving a vital area door open and unattended (July 20, 1979); a written warning for disobeying a direct order from a shift supervisor (July 23, 1979); and a 1-day suspension for stating to her supervisor, "Fuck you" (October 6, 1979). Only a week before her termination, she was absent from her assigned post; and the matter was still pending review, because of the hospitalization of John C. Mayoros, Respondent's chief of security, when the final incident took place.

There is no question that when two inspectors from the Nuclear Regulatory Commission appeared without notice on January 8, 1980, shortly after 5:30 p.m., McDonald was not performing her assigned functions as zone one guard and apparently did not for another 15 minutes or so. And there is no question that the Power Plant was cited by the Commission for this infraction, among others. The principal issue was whether McDonald was permitted to be away from her normal area or whether Respondent seized upon her absence as an excuse to terminate her because of her union activities, as the General Counsel argues, or whether, as contended by Respondent, her termination was the necessary result of her actions, without any consideration of her union activities.

McDonald was active in support of the Federation, to whom the employees turned after the Laborers Union indicated that it could not represent guards. She expressed her support to two of Respondent's supervisors—one, Sergeant Joyce Farquharson, a principal player in the final act of McDonald's employment, who never relayed McDonald's union adherence to any higher authority; the other, Sergeant John Birdsey, who never testified on behalf of Respondent. Because sergeants are supervisors, and Birdsey indicated that he would have to relate to management the names of those employees who favored the Federation, I am constrained to assume that Respondent knew of McDonald's involvement in the Federation, despite the denials of Respondent's witnesses.

The issue then boils down to one which is familiar in these discharge cases—what was Respondent's motivation? If it was McDonald's union activities, there has been a violation of Section 8(a)(3) of the Act. If Respondent was not so motivated, then Respondent may properly have discharged her for good reason, for bad reason, or for no reason at all, as long as the reason was not a pretext for her union activities. This portion of this proceeding is noteworthy solely because the testimony of the various witnesses is so wholly divergent that I suspect the whole truth has yet to be told.

The General Counsel makes a somewhat appealing case that McDonald's absence from her post was merely a pretext for her discharge. He points to Respondent's expansion of the time McDonald was away from her post—originally, from 5:30 to 5:50 p.m., but it was shown at the hearing that McDonald responded to a zone check at 5:35 or 5:37 p.m. and responded to an alarm and was at the fence at 5:52 p.m. Accordingly, the most McDonald could have been away was 17 minutes, although McDonald testified that she was absent only 5 or 10 minutes. I find it more probable that McDonald's recollection was faulty and self-serving.

The General Counsel also points to Thoma's statement that McDonald was discharged for leaving her post vacated, but McDonald testified without contradiction that zone one was frequently vacated and covered by another guard. Finally, Mayoros testified that McDonald left her post without permission, but this was contradicted by Lieutenant William J. Laurinaitis, who admitted that Farquharson told him and Mayoros that McDonald had permission to go to the restroom; and Farquharson corroborated this at the hearing. When confronted with this testimony, Mayoros testified that McDonald's problem was that she left her position without permission to get permission to leave her post, which was corroborated by Thoma.

On the other hand, McDonald's testimony was not wholly consistent with the General Counsel's theory that she had permission. Indeed, when Laurinaitis questioned her on January 9, 1980, about the events, she told him first that she did not know whether she had permission to leave and, later, that she did not have permission. It was only after that conversation, when she met Farquharson, that she was reminded that Farquharson had given her permission. The upshot is that there is a question whether she had permission to begin with, in light of her admission to Laurinaitis; and I might be more understanding of her testimony if it was corroborated by Farquharson, whose recollection of the events was far different. Whereas McDonald recalled at the hearing that she asked Farquharson whether she could leave for lunch, Farquharson recalled that McDonald either told her that she was leaving or asked her whether she could leave to go to the bathroom. She was certain that McDonald said nothing about lunch.

It appears that McDonald's admission to Laurinaitis shortly after the event in question should be credited, rather than her present testimony, at least to the extent that she never had permission to go to lunch, which McDonald in fact did. Indeed, I find that she never had permission from Farquharson, who, I find, was biased against Respondent because she was terminated from employment and because she favored organization of at

least sergeants.[6] McDonald's leaving her post without permission constituted a violation of Respondent's rules, and subjected McDonald, in light of her prior work history, to discharge. I find no pretext, especially in light of McDonald's past employment history, including a similar violation only a short time before her termination, for which McDonald had no explanation. Further, McDonald conceded that, after inspections of the Nuclear Regulatory Commission, there were always repercussions; and I find that McDonald's termination was likely the result of the inspection. Finally, it is clear that Respondent took seriously the activities of January 8, 1980, as demonstrated by its immediate demotion of Farquharson.

I conclude, therefore, that Respondent did not violate Section 8(a)(3) and (1) by terminating McDonald.

C. *Respondent's Rule Prohibiting Union Activities*

On March 3, 1980, Respondent posted the following notice:

> It has been brought to my attention that union matters and actions are being conducted on-site by members of the Security Force while they are on duty. These activities are interferring [sic] with the normal work duties and supervision plus affecting the over-all effectiveness of the Security operation on-site.
>
> These activities must be discontinued at once and must be conducted off duty.
>
> Any future activities of this nature by on-duty officers will result in disciplinary action.

Respondent's employees are on duty from the time they clock in until the time they clock out. There are no rest or break periods. Employees eat their lunch whenever they are free to do so, but are still "on duty." Respondent's rule, therefore, bars the conduct of union matters, actions, and activities throughout the work day. Despite Respondent's contention that the promulgation of the rule was prompted by employees' neglecting their duties and writing out contract proposals while at their work stations, the rule is not so limited. Rather, it effectively bars any union activities throughout the workday, despite Respondent's concession at the hearing that employees were permitted to talk about baseball and the weather, as long as such conversations did not affect their work, and in its brief that: "Certainly, an employee could engage in conversation without neglecting his duties."

As a result, Respondent's rule, although perhaps well-intentioned, was overbroad in its prohibition of any union activities, whereas other nonbusiness related activities could be engaged in. I conclude that Respondent's promulgation of this rule violated Section 8(a)(1) of the Act.[7]

[6] The credibility of both McDonald and Farquharson is also subject to question because of the inconsistencies relating to whether another guard was to cover for McDonald in her absence and who told that guard. McDonald also testified that she met Farquharson in the bathroom, testimony not corroborated by Farquharson and which I find unlikely.

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has violated the Act in certain respects, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall recommend that Raymond A. Way be reinstated to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and that he be made whole for any loss of pay suffered by him since November 2, 1979, as a result of the discrimination practiced against him, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[8] I shall also order that the illegal rule prohibiting union activities be revoked.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Interstate Security Services, Inc., Haddam, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring that employees participate in employer investigatory interviews or meetings without representation by a fellow employee, when employees have reasonable grounds to believe that the matters to be discussed

[7] Respondent further contends that Sec. 8(a)(1) bars no-solicitation rules only when employees have not already organized themselves and that there can be no interference with employees' rights to self-organization after a Board certification has issued. I find no authority, and Respondent has cited none, that Sec. 8(a)(1) and Sec. 7 rights are erased once a labor organization successfully organizes employees in an appropriate unit. Legions of decisions hold otherwise. Finally, because the Federation was certified as the exclusive bargaining representative of the guards on February 27, 1980, it would appear that Respondent's rule was unilateral and in violation of Sec. 8(a)(5) of the Act. However, because my recommended Order under Sec. 8(a)(1) adequately remedies the violation, it is unnecessary to find an additional violation of the Act.

[8] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

may result in their being the subject of disciplinary action, and disciplining employees for refusing to submit to such employer interviews or meetings.

(b) Interfering with, restraining, or coercing employees by discharging them for engaging in protected concerted activities.

(c) Promulgating any rule prohibiting employees from engaging in union activities during working hours so long as their activities do not interfere with their work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Offer Raymond A. Way immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of his discharge, in the manner provided in the section of this Decision entitled "The Remedy."

(b) Revoke its rule promulgated on March 3, 1980, prohibiting employees from engaging in any union activities during working hours.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its premises in Haddam, Connecticut, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, pending final disposition of this proceeding, pages 61-66, 158-160, and 261-268 of the official transcript be placed under seal and not be disclosed to any person other than the parties herein, their attorneys, or the Board or its agents and representatives.[11]

IT IS FURTHER ORDERED that the complaint in Case 39-CA-96 be, and the same hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.

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[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] During the course of the hearing, Respondent contended that certain testimony ought to be shielded from public disclosure because the information related to security procedures might be taken advantage of by those persons so inclined. I granted the motion. However, upon review of the actual testimony thereafter given, I am inclined to believe that much, but not all, of the testimony was not nearly as dangerous as Respondent suggested. Nonetheless, in fairness to Respondent, and in order to avoid any possible prejudice, I have continued my prior order, pending action thereon by the Board.